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MAILED

AUG 16 2010

OFFICE OF PETITIONS

In re Application of :
Gandras :
Application No. 10/716,853 : ON APPLICATION FOR
Filed: November 20, 2003 : PATENT TERM ADJUSTMENT
Atty Docket No. 2005.115US01 :

This is in response to the PATENT TERM ADJUSTMENT LETTER OF CANDOR AND GOOD FAITH, filed April 28, 2010, which is being treated as a petition under 37 CFR § 1.705(b). Applicant requests recalculation of the determination of patent term adjustment partly on the basis that the Office will take in excess of three years to issue this patent.

To the extent that applicant requests reconsideration of the patent term adjustment as it relates to the Office's failure to issue the patent within 3 years of the filing date, the application for patent term adjustment under 37 CFR 1.705(b) is **DISMISSED as PREMATURE.**

Knowledge of the actual date the patent issues is required to calculate the amount, if any, of additional patent term patentee is entitled to for Office failure to issue the patent within 3 years. See § 1.702(b). This is true even in this instance where a request for continued examination (RCE) was filed. The computer will not undertake the § 1.702(b) calculation until the actual date of issuance of the patent has been determined. Likewise, the computer will not calculate any further Office delay under § 1.702(a)(4) or applicant delay under § 1.704(c)(10) until the actual date of issuance of the patent has been determined. As such, the Office cannot make a determination on the correctness of the patent term adjustment until the patent has issued. Requesting reconsideration of the patent term adjustment to be indicated on the patent under 37 CFR 1.705(b) based on the initial determination of patent term

adjustment and a projected issuance date of the patent or even the filing date of the request for continued examination is premature. Accordingly, it is appropriate to dismiss as premature such a request.

Rather than file an application for patent term adjustment under 37 CFR 1.705(b) contesting the 37 CFR 1.702(b) calculation at the time of the mailing of the notice of allowance, applicant is advised that he may wait until the time of the issuance of the patent and file a request for reconsideration of the patent term adjustment pursuant to 37 CFR 1.705(d). As the USPTO does not calculate the amount of time earned pursuant to 37 CFR 1.702(b) until the time of the issuance of the patent, the Office will consider any request for reconsideration of the patent term adjustment due to an error in the calculation of 37 CFR 1.702(b) to be timely if the request for reconsideration is filed within two months of the issuance of the patent. However, as to all other bases for contesting the initial determination of patent term adjustment received with the notice of allowance, applicant must timely file an application for patent term adjustment prior to the payment of the issue fee¹.

To the extent that applicant otherwise requests correction of the initial determination of patent term adjustment (PTA), the application for patent term adjustment is **GRANTED to the extent indicated herein.**

The Office has updated the PALM screen to reflect that the correct Patent Term Adjustment determination at the time of the mailing of the Notice of Allowance is **one thousand three hundred seven (1307) days**. A copy of the updated PALM screen, showing the determination, is enclosed.

On April 2, 2010, the Office mailed the Determination of Patent Term Adjustment under 35 U.S.C. 154(b) in the above-identified

¹ For example, if applicant disputes both the calculation of patent term adjustment under 37 CFR 1.702(a)(1) for Office failure to mail a first Office action or notice of allowance not later than fourteen months after the date on which the application was filed and under 37 CFR 1.702(b) for Office failure to issue a patent within three years of the actual filing date of the application, then applicant must still timely file an application for patent term adjustment prior to the payment of the issue fee to contest the calculation of Office delay in issuing a first Office action or notice of allowance. See 37 CFR 1.705(b) and 35 U.S.C. 154(b)(3)(B). A dispute as to the calculation of the 37 CFR 1.702(a)(1) period raised on request for reconsideration of patent term adjustment under 37 CFR 1.705(d) will be dismissed as untimely filed.

application. The Notice stated that the patent term adjustment to date is 1297 days.

Applicant discloses that the Office failed to enter a reduction pursuant to 37 CFR 1.704(c)(7) in connection with the filing of a non-compliant appeal brief on August 13, 2007. Applicant filed a non-compliant appeal brief on August 13, 2007. On September 17, 2007, applicant filed a compliant appeal brief. Applicant is informed that ordinarily there are no reductions during the appeal period. The filing of a defective appeal brief is not an omission within the meaning on 37 CFR 1.704(c)(7) because it is not a *reply* and the rule only considers filing a reply with an omission as a failure to engage. Therefore, no reduction is warranted in connection with the filing of a non-compliant appeal brief on August 13, 2007.

Applicant argues that the Office failed to enter an adjustment for Office delay in mailing an Office action after the BPAI issued a decision on May 28, 2009. Pursuant to 37 CFR 1.702(a)(3), a 10 day period of adjustment will be entered for the period beginning on September 29, 2009, the date after four months after the May 28, 2009 BPAI decision was mailed, and ending on October 8, 2009, the date a final Office action was mailed.

In view thereof, the determination of patent term adjustment at the time of mailing of the Notice of Allowance is **one thousand three hundred seven (1307) days** (1344 days of Office delay -37 days of applicant delay).

The \$200.00 fee set forth in 37 CFR 1.18(e) for consideration of the application for patent term adjustment under 37 CFR 1.705(b) will be charged to deposit account no. 16-0631.

Any request for reconsideration of the patent term adjustment indicated on the patent must be timely filed within 2 months after issuance pursuant to 37 CFR 1.705(d) and must include payment of the required fee under 37 CFR 1.18(e).

The Office of Data Management has been advised of this decision. This application is being referred to the Office of Data Management for issuance of the patent.

Telephone inquiries specific to this decision should be directed to Senior Petitions Attorney Shirene Willis Brantley at (571) 272-3230.

A handwritten signature in black ink, appearing to read 'Anthony Knight', is written over the printed name.

Anthony Knight
Director
Office of Petitions

Enclosure: Copy of adjusted PALM calculation

Day : Saturday
Date: 8/14/2010

PALM INTRANET

Time: 14:49:34

PTA Calculations for Application: 10/716853

Application Filing Date:	11/20/2003	PTO Delay (PTO):	1334
Issue Date of Patent:		Three Years:	0
Pre-Issue Petitions:	0	Applicant Delay (APPL):	37
Post-Issue Petitions:	0	Total PTA (days):	1287
PTO Delay Adjustment:	-10		

File Contents History

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80	04/02/2010	MAIL NOTICE OF ALLOWANCE			
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78	03/30/2010	DOCUMENT VERIFICATION			
77	03/30/2010	NOTICE OF ALLOWANCE DATA VERIFICATION COMPLETED			
76	03/29/2010	NOTICE OF ALLOWABILITY			
71	01/12/2010	MAIL EXAMINER INTERVIEW SUMMARY (PTOL - 413)			
70	01/08/2010	EXAMINER INTERVIEW SUMMARY RECORD (PTOL - 413)			
69	01/07/2010	DATE FORWARDED TO EXAMINER			
68	12/22/2009	AMENDMENT SUBMITTED/ENTERED WITH FILING OF CPA/RCE			
67	12/22/2009	REQUEST FOR CONTINUED EXAMINATION (RCE)			
66	01/07/2010	DISPOSAL FOR A RCE / CPA / R129			
65	12/22/2009	WORKFLOW - REQUEST FOR RCE - BEGIN			
64	10/08/2009	MAIL FINAL REJECTION (PTOL - 326)			
63	10/08/2009	FINAL REJECTION			
62	09/09/2009	MAIL MISCELLANEOUS COMMUNICATION TO APPLICANT			
61	09/09/2009	MISCELLANEOUS COMMUNICATION TO APPLICANT - NO ACTION COUNT			
60	07/28/2009	AFFIDAVIT(S) (RULE 131 OR 132) OR EXHIBIT(S) RECEIVED			
59	07/08/2009	CHANGE IN POWER OF ATTORNEY (MAY INCLUDE ASSOCIATE POA)			

58	07/06/2009	CORRESPONDENCE ADDRESS CHANGE			
57	05/28/2009	MAIL BPAI DECISION ON APPEAL - REVERSED	693		38
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55	05/28/2009	MAIL - BPAI DECISION 41.50(B) IN IFW: 196(B)			
54	05/28/2009	BPAI DECISION 41.50(B)			
53	12/08/2008	CORRESPONDENCE ADDRESS CHANGE			
52	11/12/2008	DOCKETING NOTICE MAILED TO APPELLANT			
51	11/12/2008	ASSIGNMENT OF APPEAL NUMBER			
50	08/29/2008	APPEAL A WAITING BPAI DOCKETING			
49	10/09/2007	APPEAL READY FOR BPAI REVIEW			
48	10/26/2007	EXAM. ANS. REVIEW COMPLETE			
46	10/01/2007	EXAMINER'S ANSWER TO APPEAL BRIEF			
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28	12/13/2006	RESPONSE AFTER NON-FINAL ACTION			
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23	04/25/2006	CASE DOCKETED TO EXAMINER IN GAU			
22	04/21/2006	CASE DOCKETED TO EXAMINER IN GAU			
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15	01/11/2005	ADDITIONAL APPLICATION FILING FEES			
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EXPLANATION OF PTA CALCULATION

EXPLANATION OF PTE CALCULATION

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